

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
FEB 25 2004

OFFICE OF
MANAGING DIRECTOR

A. Thomas Carroccio, Esq.
Bell, Boyd & Lloyd, PLLC
1615 L St., N.W., Suite 1200
Washington, D.C. 20036-5610

Re: Request for Reduction of Waiver Request Fees
Norfolk Southern Corporation
Fee Control No. 00000RROG-04-010

Dear Mr. Carroccio:

This is in response to your request (dated October 30, 2003) filed on behalf of Norfolk Southern Corporation (Norfolk Southern) for a reduction of the fees associated with requests for waiver of the signature requirements of section 1.948 of the Commission's rules, 47 C.F.R. §1.948. The record before us reflects that Norfolk Southern has filed neither the requests for waiver of the section 1.948 signature requirements nor the fees associated with the instant request for fee relief.

You recite that on December 31, 1982, Norfolk Southern acquired a controlling interest in Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern Railway) (1982 Consolidation), both of which companies held private wireless licenses. You state that by acquiring direct control of Southern Railway, Norfolk Southern acquired indirect control of certain Southern Railway subsidiaries which, at the time of the 1982 Consolidation, held radio communications licenses. You state that on December 31, 1990, Norfolk Southern transferred the stock of N&W to Southern Railway, whose corporate name was changed to Norfolk Southern Railway Company (NSR) (1990 Reorganization). You state that on September 1, 1998, N&W merged with and into NSR and ceased to exist as a separate entity (Railroad Merger). You state that as a result of the Railroad Merger, NSR succeeded to all assets previously held by N&W, including many of the wireless licenses presently held and utilized by NSR.

You state that the 1982 Consolidation, the 1990 Reorganization, and the Railroad Merger (Railroad Transactions) were effectuated under the preemptive authority of the Surface Transportation Board (STB) or its predecessor agency under 49 U.S.C. §11321, *et seq.*, or predecessor statutes, but that they were effectuated "without application to, or prior consent of, the Commission." You assert that the companies involved in the Railroad Transactions (Companies) mistakenly believed that "Commission approval was not required prior to the consummation of STB-preempted railroad reorganizations involving Commission-issued licenses." You state that only recently, after meeting with Commission staff, did the Companies learn that "the Commission would require the use

of assignment or transfer of control applications to regularize the statuses and records of Commission-issued licenses involved in . . . [the] Railroad Transactions.” You state that Norfolk Southern and NSR are now proceeding with the preparation of “the last two applications necessary to regularize the statuses of all the licenses involved in the Railroad Transactions.” You state that because N&W no longer has a separate corporate existence and, therefore, has no separate officers, directors or employees to sign the “anticipated [transfer of control] applications” to “regularize” the 1982 Consolidation as required under section 1.948 of the Commission’s rules,¹ it will be necessary for Norfolk Southern and NSR to seek a waiver of the section 1.948 signature requirements to permit an alternative signatory on behalf of N&W.

In the instant request for fee relief, you seek a reduction of the \$150.00 fee associated with each of the 241 call signs for which you anticipate filing a request for waiver of the section 1.948 signature requirement. You assert that “[g]iven that the basic application filing fee is . . . \$50.00 per call sign, requiring the Companies to pay the automatic waiver fee in full would result in a quadrupling of the amount required to effectuate the two remaining filings necessary to complete the process of regularizing all of the licenses involved in the Railroad Transactions.” You maintain that the waiver request fees are “grossly disproportionate to any processing or other costs even remotely attributable thereto” and therefore pose an “unwarranted financial burden” on Norfolk Southern and NSR. You claim that a reduction is warranted by the Companies’ “candid disclosure” of their records, their “unstinting cooperation” with Commission staff, and their institution of internal measures to ensure future compliance with Commission regulations.

Section 1.1117(e) of the Commission’s rules provides that:

[a]pplicants seeking waivers must submit the request for waiver with the application or filing, required fee and FCC Form 159, or a request for deferral. A petition for waiver and/or deferral of payment must be submitted to the Office of the Managing Director as specified in paragraph (c) of this section. Waiver requests that do not include these materials will be dismissed in accordance with § 1.1109 of this subpart. Submitted fees will be returned if a waiver is granted.


¹ 47 C.F.R. §1.948 (providing that control of licenses in the Wireless Radio Services may be transferred “only upon application to and approval by the Commission.”).

The record before us reflects that you anticipate filing, but have not yet filed, the requests for waiver of the section 1.948 signature requirement that is the subject of the instant request for fee relief. Because your request for reduction of the waiver request fees did not include, and is not otherwise associated with, an underlying application or filing as required by section 1.1117(e), we dismiss your request for fee relief.²

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



 Mark A. Reger
Chief Financial Officer

² You also request a meeting with the Office of General Counsel, Office of Managing Director, and the Wireless Telecommunications Bureau to discuss the waiver request if Commission staff would consider it useful in resolving the issues at hand. Given the premature nature of your fee reduction request, we do not believe that such a meeting would be useful at this time.

BELL, BOYD & LLOYD PLLC

A. THOMAS CARROCCIO
202.955.7057
tcarroccio@bellboyd.com

00000 RROG - 04 - 010

1615 L STREET N.W., SUITE 1200
WASHINGTON, D.C. 20036-5610
202.466.6300 FAX 202.463.0678

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October 30, 2003

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PROCESSING
UNIT

Mr. Andrew S. Fishel
Office of the Managing Director
Federal Communications Commission
445 - 12th Street, S.W. (Room 1C144)
Washington, D. C. 20554

Re: Request for Partial Reduction of Waiver Request Fees

Dear Mr. Fishel:

Norfolk Southern Corporation ("Norfolk Southern") seeks partial relief from certain waiver request fees which otherwise would be occasioned by an anticipated pair of applications seeking Commission regularization of the 1982 transfer of control to Norfolk Southern of the Norfolk and Western Railway Company ("N&W"), which then held certain radio licenses issued by the Commission. To that end, Norfolk Southern requests a meeting ("Meeting") among representatives of Norfolk Southern, the Office of Managing Director, the Wireless Telecommunications Bureau ("WTB"), the Enforcement Bureau, and the Office of General Counsel. This correspondence sets forth the matters Norfolk Southern believes appropriate for discussion at the Meeting.

Transactional History

On December 31, 1982, Norfolk Southern, a then-newly-created entity, acquired a controlling interest in each of N&W and Southern Railway Company ("Southern Railway") ("1982 Consolidation"). At that time, N&W and SRC each held private wireless licenses issued by the Commission.¹

Effective December 31, 1990, Southern Railway's corporate name was changed to the present legal name, "Norfolk Southern Railway Company" ("NSR"), and the ultimate parent, Norfolk Southern, transferred all of the issued and outstanding stock of

¹ By acquiring direct control of Southern Railway, Norfolk Southern also acquired indirect control of certain Southern Railway subsidiaries (the "NSR Subsidiaries"), which, at the time of the 1982 Consolidation, held radio communications licenses issued by the FCC. No Commission-issued licenses were held by subsidiaries of N&W.

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one principal subsidiary, N&W, to its other principal subsidiary, NSR ("1990 Reorganization").²

Effective September 1, 1998, NW was fully merged with and into NSR, after which merger N&W ceased to exist as a separate entity ("Railroad Merger" and, together with the 1982 Consolidation and the 1990 Reorganization, the "Railroad Transactions"). As a result of the Railroad Merger, NSR, as the surviving corporate entity, formally succeeded, by operation of law, to all assets previously held by N&W, including many of the Commission-issued wireless licenses presently held and utilized by NSR.

All of the Railroad Transactions were effectuated under the preemptive authority of the Surface Transportation Board ("STB"), or its predecessor agency, which authority was exercised pursuant to 49 U.S.C. § 11321, *et seq.*, or predecessor statutes ("Preemption Statutes"),³ but without application to, or prior consent of, the Commission.

² Unless context hereafter requires otherwise, no distinction will be drawn between NSR's pre-1990 and post-1990 corporate names. Norfolk Southern, NSR and their affiliates hereafter may be referred to collectively as the "Companies".

³ 49 U.S.C. § 11321, *et seq.*, which governs railroad reorganizations subject to the jurisdiction of the STB, states, *inter alia*, as follows:

Scope of authority. (a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

See, Norfolk and Western Railway Company, et al. v. American Train Dispatchers' Association, et al., 499 U.S. 117 (1991) (because petitioners' mergers were approved by the [STB predecessor], under 49 U.S.C. § 11341(a), petitioners were expressly exempt from all laws where such exemption was needed to carry out the mergers); *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) ("In fact, there is nothing in the case law that supports [petitioner's] argument that, through the ICCTA, Congress only intended preemption of economic regulation of the

Procedural History

It long had been the Companies' understanding and belief that Commission approval was not required prior to the consummation of STB-preempted railroad reorganizations involving Commission-issued licenses. Instead, the Companies understood and believed that changes to Commission records necessitated by preempted railroad reorganizations could legitimately be accomplished by requesting a "change of licensee name" in connection with post-transaction applications for modification or renewal of affected licenses.⁴ The Companies relied upon, and utilized, such procedures until a post-Railroad Merger application for modification of a license originally issued in the name of N&W, which application included a request for change of licensee name to NSR, was returned by the Commission.⁵

Since that application return, the Companies have undertaken a continuing series of corrective measures designed to regularize the status and records of every Commission-issued license involved in the Railroad Transactions. To that end, the Companies have met and consulted with representatives of both the AAR and the Commission, including representatives of the Wireless Telecommunications Bureau ("WTB") and the Enforcement Bureau ("EB"). From its initial consultations with the WTB, the Companies came to understand the Commission's position that a change of licensee name resulting from a Railroad Transaction could not be effectuated by including a request for change of name in a post-transaction application for renewal or modification of the license. The Companies also came to understand that the Commission would require the use of assignment or transfer of control applications to regularize the statuses and records of Commission-issued licenses involved in already consummated Railroad Transactions.

railroads. All the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one").

⁴ Although the genesis of this apparently decades-old understanding and belief is unclear, it appears the Companies' good faith reliance on such procedures was based on a combination of the Preemption Statutes and the Companies' understanding of advice and guidance provided by various advisors and consultants, including the communications licensing coordination group at the Association of American Railroads ("AAR"), which, *inter alia*, is the coordinator for the railroad frequencies. NSR has not sought to determine whether other railroads shared this understanding.

⁵ Call Sign/File Number: KB62946/D143975. The returned application had been filed through AAR.

In an effort to meet all Commission requirements, the Companies have consulted with representatives of the WTB at each stage of a continuing license regularization process. In accordance with arrangements worked out with the WTB, the Companies have prepared and filed with the Commission a series of assignment and transfer of control applications designed to regularize the license assignments and transfers of control occasioned by all the Railroad Transactions, including transactions involving certain NSR Subsidiaries. As of this writing, the only licenses that were involved in the Railroad Transactions which have not been the subjects of *post hoc* regularizing applications are those licenses which were both (a) originally issued to N&W and (b) involved in the 1982 Consolidation.

Norfolk Southern and NSR now are proceeding with the preparation and filing of the last two applications necessary to regularize the statuses of all the licenses involved in the Railroad Transactions.⁶ It is with respect to those two applications that NSR seeks partial relief from certain waiver request fees associated with the anticipated filing.

Waiver Requirements

Section 1.948 of the Commission's Rules, 47 C.F.R. § 1.948 ("Section 1.948"), provides that control of licenses in the Wireless Radio Services may be transferred "only upon application to...the Commission" and contemplates that the transferor's portion of such an application will be signed by an officer, director, or authorized employee of the applicant transferor, if that applicant is a corporation.⁷

The 1982 Consolidation occasioned, *inter alia*, the transfer of control of N&W, which, at that time, was a discrete corporate entity holding Commission-issued licenses. As a result of the subsequent Railroad Merger, N&W was merged into NSR and ceased to exist as a distinct entity. N&W no longer has a separate corporate existence and, therefore, presently has no separate officers, directors or employees to sign the anticipated applications. Accordingly, it will be necessary for the applicants to request that Section 1.948 of the Rules be waived to the extent necessary for the filing,

⁶ N&W licenses involved in the 1982 Consolidation include both land mobile and microwave licenses. Because the Companies maintain separate FRNs for their land mobile licenses and microwave licenses, it will be necessary to address the N&W licenses involved in the 1982 Consolidation in two separate, but concurrently filed, applications.

⁷ See, also, 47 C.F.R. § 1.917.

acceptance, processing and grant of the subject application with an alternative signatory on behalf of N&W.⁸

Norfolk Southern and NSR are confident they will make the required showing of good cause for a waiver.⁹ Under Section 1.925, a petitioner must demonstrate either (1) that a grant of the waiver would be in the public interest and the underlying purpose of the rule would be frustrated or not served by application to the present case; or (2) that, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or that the applicant has no reasonable alternative.¹⁰

Relief from Waiver Request Fees

The WTB's Universal Licensing System ("ULS") automatically assesses a fee on each waiver request associated with an application filed through ULS. That fee presently is One Hundred Fifty Dollars (\$150.00) for each call sign for which a waiver is sought. The two anticipated N&W applications will cover two hundred forty-one (241) call signs. Accordingly, the resulting waiver request fees would total Thirty-six Thousand One Hundred Fifty Dollars (\$36,150.00). Given that the basic application filing fee is Fifty Dollars (\$50.00) per call sign, requiring the Companies to pay the automatic waiver fee in full would result in a quadrupling of the amount required to effectuate the two remaining filings necessary to complete the process of regularizing all of the licenses involved in the Railroad Transactions.

The Commission long has acknowledged that the legitimate purpose of all filing fees is to provide a mechanism by which the Commission can recover its costs of processing applications and associated activities. In the instant case, however, it would appear that, by virtue of the multiplier effect which would operate automatically with

⁸ At all times relevant hereto, all licenses issued to the Companies by the Commission have been maintained and managed by the employees of NSR's Communications Engineering Department. It is anticipated that a current employee of NSR's Communications Engineering Department, which employee presently acts in a capacity with authority to sign applications to the Commission, will be N&W's designated signatory on the applications. That anticipated signatory is the individual most familiar with the Companies' licensing history and records, including the history and records regarding the N&W licenses and, therefore, is the individual best qualified to act as signatory on behalf of N&W.

⁹ 47 CFR § 1.925.

¹⁰ NSR's request for waiver of Section 1.948 with regard to a previous regularizing application was granted upon good cause shown. *See, also, International Business Machines, DA) 01-527* (released March 12, 2001).

regard to the anticipated applications, the resulting waiver request fees would be grossly disproportionate to any processing or other costs even remotely attributable thereto. In no small part, it is that factor that now leads Norfolk Southern and NSR to seek partial relief from the unwarranted financial burdens that an automatic imposition of waiver request fees would occasion.

It is submitted that a grant of partial relief also is warranted by the Companies' unstinting cooperation in the processes the Commission Staff has specified for the regularization of the licenses involved in the Railroad Transactions. Once they understood the procedures by which the Commission sought to regularize the status and records of the licenses involved in the Railroad Transactions, the Companies undertook a still-ongoing series of application filings designed to meet those requirements. The Companies undertook those activities in a spirit of willing cooperation, and notwithstanding the protections available to them under the broad preemptive effects afforded by 49 U.S.C. § 11321.

It should be noted that the Companies, knowing the state of the Commission's early license records, could have stood back and waited while the Commission tried, most likely in vain, to determine the statuses of the subject N&W licenses involved in the 1982 Consolidation. Instead, the Companies, recognizing and acting on their licensee obligations of candor and cooperation, undertook an extensive retrieval and review of their own records. They then were totally forthcoming in sharing their findings with the Commission, even though such candid disclosure has caused them to incur very substantial costs, not the least of which have been the large filing fees occasioned by the regularizing applications filed to date.

It also should be noted that the Companies have put in place internal measures designed to assure that their future railroad-reorganization activities impacting the statuses of Commission-issued licenses are carried out in a manner consistent with all applicable regulatory schemes. Specifically, NS personnel responsible for corporate restructurings have been alerted to the need to have any restructurings involving Commission licenses properly reflected in the Commission's records. In addition, such NS personnel have been instructed that, in the event a transaction will involve a transfer or assignment of an FCC license, they are to contact appropriate Commission personnel to arrange filing or notification procedures compatible with both the broad preemptive effect of 49 U.S.C. § 11321 and the Commission's need to maintain complete and accurate license records.

Request for Meeting

The Companies recognize that one method for obtaining relief from any fee routinely imposed by the Commission is to pay the fee when nominally due, and request a refund upon determination and grant of relief. In the instant case, however, the Companies believe the process would be served better through another accepted method; pre-filing discussion and negotiation. Hence the request for the Meeting.

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The Companies believe the Meeting would provide an opportunity for an examination of various factors of decisional significance, including, but certainly not limited to, the preemptive effect of 49 U.S.C. § 11321, *et seq.* The Meeting also would provide a forum in which to determine and set reasonable and fair amounts as the fees for the necessary signature waiver requests. It should be emphasized that the Companies, recognizing that the Commission will incur some costs in processing the signature waiver request for each application, seek only partial relief from the automatically imposed and computed waiver request fees.¹¹

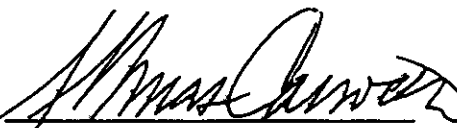
It presently is anticipated that Norfolk Southern will be represented at the Meeting by the undersigned member of this firm.

We will call Ms. Claudette E. Pride on Tuesday, November 4, 2003, to discuss Meeting arrangements and any additional issues the Commission may have identified by that time. Should you have any questions or comments in the meantime, please contact the undersigned.

Sincerely,

BELL, BOYD & LLOYD PLLC

By:


A. Thomas Carroccio

cc: Ms. Claudette E. Pride (OMD)
Jeffrey Tobias, Esquire (WTB)

¹¹ The Companies have not heretofore sought relief from any of the substantial application and waiver fees occasioned by their ongoing license regularization efforts. In connection with the sixteen (16) application sets filed to date, the Companies have incurred Eighty-three Thousand, Nine Hundred Ten Dollars (\$83,910.00) in filing fees.